Nos. 18404, 18405, 18407 & 18408

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18404

THE CITY OF LOS ANGELES,

Appellant,

vs.

FIREMAN'S FUND INSURANCE COMPANY, *et al.*,

Appellees and Cross-Appellants.

No. 18405

THE CITY OF LOS ANGELES,

Appellant,

vs.

FIRE ASSOCIATION OF PHILADELPHIA, *et al.*,

Appellees.

(Continued on Inside Cover)

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

McCUTCHEN, BLACK, VERLEGER & SHEA
PHILIP K. VERLEGER
JOHN LAWRENCE LEARY
Suite 1111, 615 South Flower St.
Los Angeles, California 90017
Proctors for Appellees and Cross-Appellants.

Jeffries Banknote Company, Los Angeles — MA 7-9511

No. 18407

THE CITY OF LOS ANGELES,

Appellant,

vs.

D. R. GUSTAVESON, *et al.*,

Appellees.

No. 18408

THE CITY OF LOS ANGELES,

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BRIEF FOR APPELLEES AND CROSS-APPELLANTS

JURISDICTIONAL STATEMENT

These appeals are from final decrees in admiralty of the United States District Court for the Southern District of California, Central Division, Honorable William M. Byrne, Judge presiding. [Transcript of Record in Case No. 18404 (hereinafter referred to as "C.T.") pp. 224-245, essentially the same decrees having been made in the other cases, Nos. 18405, 18407 and 18408, except as to damages.] Such decrees adjudged that appellees recover from The City of Los Angeles, a municipal corporation (hereinafter "the City"), certain damages by reason of an oil spill on the waters of Los Angeles Harbor on July 11, 1957, which caused damage to appellees' small boats. Cross-appellants (who are also the appellees in Cases Nos. 18404 and 18408) have, in turn, appealed from the final decrees only for failing to grant them interest from the date of the casualty to the date of the final decree, and for failing to award them certain costs.

The cause of action in each case admittedly arose on waters [C.T.183] which made it subject to the constitutional grant of admiralty and maritime jurisdiction to the district courts (Art. III, § 2); jurisdiction also exists by virtue of § 1333 (1) of Title 28 of the United States Code.

The jurisdiction of this court to review the decrees rests upon timely notices of appeal filed by appellant the City and by cross-appellants [Transcript of Record

in Case No. 18404, pp. 267 and 272; in No. 18405, p. 63; in No. 18407, p. 74; and in No. 18408, pp. 93 and 96], under the authority of 28 U.S.C. §§ 1291, 1294(1), and 2107. No direct review by the Supreme Court may be had in these causes.

STATEMENT OF THE CASE

The City appeals from final decrees which awarded appellees damages against the City by reason of the oil spill, and the cross-appellants appeal from two of the decrees for failure to award interest to them from the time of the casualty to the time of entry of the final decrees, and for failure to award cross-appellants certain costs.

QUESTIONS PRESENTED

A. On the appeals by the City:

Were the decrees and the findings in support thereof, awarding damages to appellees and against the City because of such spill, clearly erroneous?

B. On the cross-appeals:

(1) In view of the findings of fact made by the district court, should the district court have awarded interest to cross-appellants from the date of the casualty until the date of entry of the final decrees?

(2) Should each of the cross-appellants recover a statutory docket fee under 28 U.S.C. § 1923?

(3) Should the cross-appellants recover their costs of copies of certain depositions used at trial?

STATEMENT OF FACTS

The story of the casualty which is the subject of these appeals is not in serious dispute. While the statement of facts presented by the City in its opening brief omits certain significant details and gives undue emphasis to others, there is, moreover, no substantial dispute as to the physical cause of what occurred. In large part, if not entirely, the story, including the cause of the casualty, may be drawn from the facts stipulated as part of the pretrial conference order [C.T. 184-194] and from the district court's findings of fact [C.T. 225-239]. Reduced to its essentials, the story is this:

1. The City decided to build an extension to its wharf (known as "the Matson Terminal") north of Bent 213, and contracted with Ben C. Gerwick, Inc. ("Gerwick") for Gerwick to construct such terminal facility, including a wharf and pipeline system. [Finding (9).]

2. The City supplied detailed plans and specifications to Gerwick. These plans required that an expansion joint be provided in the ten-inch oil pipeline under the wharf (and over the harbor waters) at a point between Bents Nos. 221 and 222. [Finding (10).]

3. During the course of construction, when the time arrived for the expansion joint to be installed in the pipeline, Gerwick inquired of the City as to exactly what was to be placed there, since the City's plans were ambiguous on this point—as the City's Chief Harbor Engineer has admitted [R.T. 567-568]. [Findings (26) (d) and (f).] (The City itself now admits ambiguity as to at least a portion of such plans which are here material [App. Op. Br. p. 6].)

4. The City told Gerwick to install a Style 38 Dresser coupling at this point. [Finding (25)(b).] All parties are agreed that a Style 38 Dresser coupling is not an expansion joint. [App. Op. Br. p. 8; Findings (25)(b) and (c), and (26)(g).]

5. The line required one or more expansion joints at or about Bents Nos. 221 and 222. [App. Op. Br. p. 6.]

6. After installing the Style 38 Dresser coupling in the line at this point, the line was hydrostatically pressure tested (i.e., by pressure testing it with water) in accordance with the requirements of the contract, which required the line to sustain a test pressure of 400 pounds per square inch. [Finding (11).]

7. The pipeline failed the first test on September 11, 1956, by separating at the coupling at a pressure of 200 pounds per square inch. Both the City and Gerwick knew this. [App. Op. Br. p. 8; Findings (11) and (26)(j).]

8. The pipeline was then reassembled at the coupling and the next day a second test was performed and again the pipeline separated at the coupling. The City and Gerwick knew this also. [App. Op. Br. pp. 8-9; Findings (11) and (26)(j).]

9. The pipeline was again reassembled at the coupling, and this time threaded bolts were placed through the coupling and attached to anchor clips welded on each side of the pipe both north and south of the coupling, to hold the pipe securely in the coupling. Additionally, timber thrust blocking was placed at the first

right angle turn in the pipeline just north of the coupling, to prevent the pipe "kicking out" of the coupling when pressure was applied. Again a hydrostatic test was run, and this time the pipeline held a pressure in excess of 400 pounds. [App. Op. Br. pp. 8-9; Findings (12) and (26)(m).]

10. Gerwick then inquired of City what it wanted done respecting the above-mentioned devices used to enable the pipeline to pass the pressure test. [App. Op. Br. p. 9.] At the City's instruction, the thrust blocking, anchor clips and bolts were all removed. [App. Op. Br. p. 9; Findings (13) and (26)(n).]

11. Thereafter by letter dated October 11, 1957 (Exhibit 16, perhaps the most significant exhibit in a rather extensive series of exhibits), Gerwick's superintendent and project engineer specifically advised the City's Chief Harbor Engineer that the blocking necessary successfully to pressure test the ten-inch oil pipeline had been removed, even though the Gerwick supervisor considered such blocking to be imperative to the safety of the line, because without it the line would separate at the coupling under conditions of normal use. [Finding (14).] In fact, the City's own inspector told this to his superior [R.T. 560].

12. The City received such letter, the Chief Harbor Engineer and his assistant discussed it, and thereafter the City did nothing until May of 1957. [App. Op. Br. p. 10.] At that time, the City installed sway bracing at Bent No. 225 on the ten-inch oil pipeline which was markedly different in characteristics and effect from the

thrust blocking Gerwick had previously installed when the pipeline passed the pressure test, and which had thereafter been removed at the City's request. [Findings (15) and (26)(p) and (q).]

13. The City did not again hydrostatically pressure test the line after it put in this new bracing and before the line was put in operation [Finding (26)(r).], nor did the City even observe the line or the coupling upon its first and subsequent uses in actual operation. [Finding (26)(s).]

14. After being put in operation, the pipeline was used precisely four times for bunkering ships with oil north of Bent No. 213, commencing on July 3, 1957. On the fourth such use on July 11th, the pipeline separated at the coupling and spilled some 1600 barrels of fuel oil into the waters of Los Angeles Harbor. [Findings (16) and (17).]

15. The libelants (appellees herein) were the owners (or subrogated to the rights of the owners) of small boats in Los Angeles Harbor which were damaged by the oil spill, each in a stipulated amount. [C.T. 188, par. (16); Findings (18) and (19).]

The foregoing are the bare facts of this case. They are largely undisputed. Additional factual propositions, on which a wealth of testimony was adduced at trial, are in the court's findings of fact No. 25 (as to the defects of the pipeline) and No. 26 (detailing the incredible negligence of the City respecting it). [C.T. 233-238.] Such findings are the bare bones of many days of testimony, and squarely answer the two principal issues of

fact raised in these cases and set out in the pretrial conference order [C.T. 195, issues (1) and (2)]. Such findings are set forth as Appendix A to this brief. Of note is that the City's opening brief does not seem to challenge them.

SPECIFICATIONS OF ERRORS ON THE CROSS-APPEALS

1. The district court erred in failing to allow any interest on the damages awarded to cross-appellants from and after July 11, 1957, the date of the oil spill casualty herein, until May 2, 1962, the date of the entry of the final decrees.

2. The district court erred in failing to award a statutory docket fee to each cross-appellant pursuant to 28 U.S.C. § 1923.

3. The district court erred in failing to award cross-appellants their costs of copies of depositions used at trial.

SUMMARY OF ARGUMENT

(1) On the appeals by the City:

After an extended trial (the reporter's transcript alone totals 2,030 pages) and voluminous discovery and briefing, the City now challenges the final decrees in favor of the appellees on the single ground that the City allegedly owned the harbor and its waters, and owed no duty to appellees, as vessel owners, which required the City to avoid damaging them in the circumstances of this case. Such contention by the City is misconceived:

first, because there is no showing that the final decrees are in this respect clearly erroneous; and secondly, because this contention is itself erroneous in ignoring the facts, and on those facts finds no support in the law.

(2) On the cross-appeals:

The district court expressly found in each case "that there has been no unnecessary or unreasonable delay by any libelant herein in filing [these actions] or in prosecuting [them] through trial". In view both of such express finding and of the history of these actions as seen in the record, the failure of the district court in an admiralty action to award cross-appellants interest on their awarded damages from the date of the casualty to the date of entry of the final decree was an abuse of discretion, which was clearly contrary to the law and practice in admiralty.

Furthermore, under applicable statutory law, each cross-appellant is entitled to a statutory docket fee under 28 U.S.C. § 1923, and under the law and in equity, cross-appellants are also entitled to their costs for copies of depositions used on trial of these actions.

ARGUMENT

I

The Decrees of the District Court Awarding Damages to Appellees Against the City Were Not Clearly Erroneous.

The principle of review applicable in this case is set forth in Rule 52(a), F.R.C.P., that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge of the credibility of the witnesses." This principle of review is applicable in admiralty cases.

McAllister v. United States,
348 U.S. 19, 20 (1954),

Guzman v. Pichirilo,
369 U.S. 698, 702 (1962),

Gypsum Carrier, Inc. v. Handelsman,
307 F.2d 525, 527-528 (9th Cir. 1962).

Here, the trial judge had fourteen trial days in which to hear the evidence and observe the credibility and demeanor of the witnesses.

In view of the facts, it is not to be wondered at that this casualty occurred: it was inevitable. (The City's Assistant Chief Harbor Engineer himself admitted the only question was "when" [R.T. 1850].) The only source of wonderment is that it did not occur on the first bunkering north of Bent No. 213, rather than on the fourth. The City's argument on appeal is one in confession and avoidance. It admits the essential facts of its own negligence. It makes no challenge to the detailed specifications of its negligence which were found in findings (25) and (26). (See, e.g., App. Op. Br. p. 15, specification 5.)

The sole point raised by the City against appellees seems to boil down to the argument that the City owed no duty to the appellees to refrain from damaging them by palpable negligence. This argument is grounded on several erroneous assumptions:

(1) The first erroneous assumption is that the City owns the harbor and has the right to exclude others, including appellees. [App. Op. Br. p. 17.]

As a matter of fact, the evidence on trial was to the contrary. Mr. Howard G. Walters, a witness who testified on trial for the City, and who is Chief of the Special Navigation Projects Section of the United States Army Corps of Engineers, testified that vessels of any size may navigate anywhere in the harbor, and anchor alongside a wharf in navigable channels, and no one can prevent them from so doing. [R.T. 1417, 1423] He further testified at length that no one can erect structures seaward of the pierhead line without a permit from the Department of the Army [R.T. 1412] — which is hardly consistent with the City's alleged ownership of the harbor.

As a matter of law, the City's sole legal authority for this proposition [App. Op. Br. p. 17] is an uncodified 1929 California statute (Statutes of California, 1929, Chap. 651), which granted the harbor tidelands and submerged lands already within the City boundaries to the City *in trust* for certain uses, upon the express condition that "any harbor constructed thereon shall always remain a public harbor for all purposes of commerce and navigation," and with the express reservation "in the people of the State of California, the absolute right to fish in said waters, with the right of convenient access to said waters over said [submerged] lands for said purposes."

The authority the City relies on therefore establishes two things: *one,* a bare legal title in the City, and *two,* a right in boat owners and others to use the waters of the harbor, *in toto.* This is a complete contradiction of the exclusive rights the City seemingly claims. Indeed, the proposition the City here is urging is expressly contrary to Article XV, Sec. 2 of the Constitution of the State of California, which provides as follows:

> "§ **2. Access to Navigable Waters**
>
> Sec. 2. No individual, partnership, or corporation [the City is a municipal corporation], claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Accordingly, whether or not the City "owns" the harbor as it claims is inconsequential to these appeals, for it cannot deny appellees and others the free use of the harbor.

(2) The second fundamental link in the City's argument is that "its duty to vessels within the harbor is to be measured according to the principles applicable to occupiers of land." (App. Op. Br. p. 17, point I A.) At best this is sheer *ipse dixit,* not sustained by any reasoning or holding cited in pp. 17-20 of the City's

opening brief (which alone appear to be devoted to this point). At worst, it is simply not true. In

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959),

the Supreme Court considered this very question of whether admiralty recognizes common law distinctions as to status. It decided in unmistakable language that it does not. The entire opinion from pages 630 through 632 is a reasoned and complete rejection of the proposition here urged by the City. Mr. Justice Stewart, in the concluding paragraph of his opinion, stated:

> "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality." (*Id.* at 631)

Nothing need be added to that conclusive rejection of the City's argument.

(3) Even assuming, arguendo, that land status mattered in admiralty, the City's brief, either unfortunately or deliberately, does not set forth just what status the City now claims appellees' vessels did enjoy. The best the City could hope for is that the appellees' vessels had the lowest possible status, i.e., were mere trespassers, in an unauthorized harbor area. But even if we assume that appellees were mere trespassers, the City's argument still fails, on the City's own authority. In *The Chancellor,* 30 F.2d 227, 228 (2d Cir. 1929), cited by the City on p. 18 of its brief, the court stated with respect to a vessel which was a trespasser:

> "When the proprietor does not know of the presence of a trespasser, or have reason to expect his advent,

it is hard to imagine how he can be under any duty toward such a contingent invader. But it would seem to be *only* in such cases that no duty toward a trespasser exists." (Emphasis added.)

The City can hardly claim "it does not know of the presence of [appellees' vessels], or have reason to expect [their] advent", particularly in view of the evidence that the City has erected a series of berths (for bigger ships) and slips (for smaller vessels), which berths and slips it regularly leases to various tenants [R.T. 1425, 1437] and permittees [R.T. 1432]. Implicit in this whole system is leave — nay, an invitation — to small boats to use the harbor. By its own authority, therefore, the City owes a duty to appellees even if they were trespassers.

But even this assumption would be contrary to the evidence, since the City's own witness Walters testified that vessels of any size may navigate anywhere in the harbor and no one can prevent them from so doing [R.T. 1417, 1423]. The City's witness and employee Higbee testified that the navigable channels in and around the Matson Terminal were inundated with oil by this spill [R.T. 1609, 1610], which damaged various unnamed vessels [R.T. 1618-1619]. It has been stipulated that each of appellees' small vessels were damaged by this oil spill [C.T. 188, par. (16)]. California Code of Civil Procedure § 1963 subd. (1) sets forth the disputable presumption that a person is innocent of crime or wrong, i.e. here, the presumption is that appellees' vessels were in those navigable channels and therefore lawfully in the harbor. This presumption is conclusive here, since the

City did not introduce a scintilla of evidence that any single libelant's vessel, or group of such vessels, were trespassers in a so-called "unauthorized" area. Because of the City's failure to introduce such evidence, its argument must fail.

Accordingly, the district court made a finding in each case that "there is no evidence that said vessels were not rightfully in the harbor at the time that they were so damaged" [C.T. 231, Finding of Fact (18)], which finding is not clearly erroneous.

In this context it is well to bear in mind the practical observations of the California District Court of Appeal for the Second District in *Hall v. Macco Corp.*, 198 Cal. App.2d 415, 421, 18 Cal.Rptr.273 (1961), where a negligent defendant also claimed it had no duty to a plaintiff injured by such negligence:

> "Every person in his intercourse with his fellows owes to them certain natural, inherent duties, of which all normal persons are conscious, among which is the duty of protecting life and limb against peril when it is in his power to reasonably do so. (*Katz v. Helbing*, 205 Cal. 629, 638 [271 P. 1062, 62 A.L.R. 825]; 38 Am.Jur. § 14, p.655.) Everyone is responsible for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. (Civ. Code, § 1714.)"

In summation, the City's argument is grounded on the erroneous assumptions that the City owns the harbor and has the right to exclude others, and that common

law concepts of status are meaningful in admiralty. Even disregarding such pivotal fallacies, the City cannot on the record before this court challenge the finding that "there is no evidence that [appellees'] vessels were not rightfully in the harbor at the time they were so damaged."

Appellees accordingly respectfully urge that the City's sole point on appeal against these appellees should be rejected.

II

Since There was No Unnecessary or Unreasonable Delay by any Libelant, Seven Per Cent Interest Should be Awarded Each Cross-Appellant from the Date of the Casualty to the Date of Entry of the Final Decree.

The district court awarded damages to the cross-appellants in the sum of $37,264.81 in Case No. 18404 [C.T. 244] and in the sum of $3,140.76 in Case No. 18408 [Transcript of Record in Case No. 18408, p. 89]. It refused to grant interest on said sum for the almost five-year period from the date of the casualty (July 11, 1957) to the date of entry of each of the final decrees (May 2, 1962), assigning no reasons whatsoever for such refusal. In each case, however, the court made a specific finding of fact "that there has been no unnecessary or unreasonable delay by any libelant herein in filing [these actions] or in prosecuting [them] through trial" [Transcript of Record in Case No. 18404, p. 239, Finding of Fact (38); in Case No. 18408, p. 88, Finding of Fact (38)]. The lengthy transcript of record in each case fully sustains such finding. Cross-appellants observe that the record

shows that the delays in obtaining a pretrial conference order were necessitated by the need for further discovery depositions and by attempts to settle the form of the pretrial conference order, including a statement of agreed facts [e.g., C.T. 165, 169]. Since cross-appellants took none of the depositions, and since settlement of the form of the pretrial conference order prevented a longer trial, the delay is hardly either at cross-appellants' door or unnecessary. (These circumstances (as respects interest) are very similar to those which the Court of Appeals for the Second Circuit believed justified a grant of sixteen years' pre-judgment interest. *Lekas & Drivas v. Goulandris,* 306 F.2d 426 (2d Cir. 1962).) Accordingly, the quoted Finding (38) is both supported and proper.

A. It was an Abuse of Discretion for the Trial Court to Deny Pre-Judgment Interest.

Pre-judgment interest is an essential element of the damages recoverable for loss in admiralty. It is a partial measure of the amount necessary fully to compensate the injured party for the loss sustained due to the lapse of time between the breach of duty for which the person injured is being compensated and the date the award is made. *The President Madison,* 91 F.2d 835, 845-846 (9th Cir. 1937). As such, it is sometimes called "moratory" interest, i.e., interest as damages. A discussion of the nature of such interest as an integral part of the damages awarded in admiralty is to be found in *The Manhattan,* 85 F.2d 427, 429 (3rd Cir. 1936), cert. den. sub. nom. *United States v. The Bessemer,* 300 U.S. 654 (1937):

> "Until an award is made of the damages, interest qua interest is not allowed, but delay in making compensation is an element in determining the damages. Damage is sustained as of a certain date. What the damage is may not be and is not affected by the time when estimated, but the damage is as found, and an award made on one date is not the equivalent of an award made at an earlier date. The delay thus enters into the late award as an element of loss, and the damage awarded is for a sum which is the equivalent of what would have been a smaller sum if earlier awarded." (85 F.2d at 429)

To the same effect is *The Hannah A. Lennen,* 77 F.Supp. 471, 472 (D. Del. 1948):

> "The term 'interest' as applied in connection with a loss cognizable in admiralty is somewhat of a misnomer. In cases of debt interest is allowed qua interest because the parties expressly or impliedly agreed to pay such interest. In cases of loss cognizable in admiralty the damages recoverable do not bear interest as such but an amount may be allowed as additional compensation for the delay in payment. . ."

Because of the integral role that damages in the form of pre-judgment interest play in admiralty cases in making the injured party whole, the courts have consistently taken the view that there is a presumptive right to such interest. Some examples of the plethora of cases to this effect are:

The President Madison, supra, 91 F.2d 835, at 847, where this court stated the general rule, in amending the

district court's final decree so as to allow pre-judgment interest:

"Under *The Umbria* rule interest may be refused under the 'peculiar facts' of the case, such as extraordinary delay in commencing or prosecution of the libel. This is within the discretion of the court, but the discretion must be exercised with a view to the *right to interest unless the circumstances are exceptional.*" (Emphasis added.)

The Wright, 109 F.2d 699, 702 (2d Cir. 1938):

"It is stated repeatedly that the award of interest in admiralty is a matter of the court's discretion . . . But the cases show that this is a legal discretion, and *the award is to be made whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal.*" (Emphasis added.)

American Smelt. & Refin. Co. v. Black Diamond S.S. Corp., 188 F.Supp. 790, 792 (S.D. N.Y. 1960):

"It is true that the allowance of interest in admiralty suits rests within the discretion of the court. *But the purpose of damages to make whole the injured party may be effectively served only if interest is awarded. It follows, therefore, that discretion may be utilized to disallow interest only in the face of 'exceptional circumstances'.*" (Emphasis added.)

Aguadilla Terminal, Inc., et al. v. American Union Transport, Inc., 1962 A.M.C. 2471 (D. P.R. 1962), after remand from the Court of Appeals (302 F. 2d 394, 396 (1st Cir. 1962)) to consider whether interest should be allowed:

> "A careful search of the record herein *fails to reveal any exceptional circumstances that would support a disallowance of the interest* requested by the libelant Insurance Company of North American, *and disallowance would constitute an abuse of discretion.* This Court, indeed, was in error in its original decree in allowing interest only from the date of said decree." (Emphasis added.)

Thus, while it is frequently stated that the allowance of pre-judgment interest is discretionary with the Court, the discretion to be exercised is a legal, not an arbitrary one:

> "[T]he allowance of additional damage by way of interest rests in the *sound legal discretion of the court.*" (Emphasis added.)
>
> *The Hannah A. Lennen, supra,* 77 F. Supp. at 472. See also 36 A.L.R. 2d 337, at 359-364.

Increasingly, such discretion is being exercised even in civil cases in favor of awarding interest; see *Robert C. Herd & Company v. Krawill Machinery Corp.,* 256 F.2d 946, 952-953 (4th Cir. 1958), aff'd 359 U.S. 297 (1959).

This court has noted that an abuse of discretion in denying interest in admiralty is reviewable.

The President Madison, supra, 91 F. 2d at 845.

It is clear, then, that the question here is whether there are "peculiar facts" or "exceptional circumstances" which would justify the lower court's denial of pre-

judgment interest. This court in *The President Madison, supra,* amended a decree denying the owner of a vessel lost in a collision interest from the date of the loss, and allowed the interest where there was no finding of the "peculiar facts" necessary to justify such a denial, and where the record did not show such facts. In the instant case, not only is there nothing in the record to show such "peculiar facts", but there is a specific finding by the district judge "that there has been no unnecessary delay by any libelant herein in filing this action or in prosecuting it through trial." [Finding of Fact (38).] This indicates that there was no *legal* basis for the denial of such interest in the district court. The decree below should accordingly be amended by the court to allow pre-judgment interest on the damages recovered.

B. All Cross-Appellants are Entitled to Pre-Judgment Interest Running from the Date of the Oil Spill.

Once it is established that cross-appellants are entitled to pre-judgment interest as an element of damages, the next question is the date from which that interest should run. As to the cross-appellants who are owners, the only logical date is the date of the casualty. As to the subrogated insurer cross-appellants, it is clear that interest should run from (1) the date of the casualty, or (2) at least the stipulated [C.T. 215-217] date of payment (October 10, 1957) by such cross-appellants to their assureds. From the date of the casualty the City had the use of money which it was later determined that City owed to cross-appellants. As brought out by the authorities cited above, delay in payment is an element of the loss.

As to appellants who are subrogated insurers, they would not be fully compensated were interest not granted running at least from the stipulated date of payment to their assureds. It is, however, cross-appellants' contention that the interest should run as to all cross-appellants from the earlier date, that of the oil spill (July 11, 1957). The insurance carrier cross-appellants are subrogated insurers, who stand in the shoes of their assureds. A case in point on both the interest and subrogation issues is

> *United States v. Panama Transport Company,* 155 F. Supp. 699, 707-708 (S.D. N.Y. 1957), aff'd. 253 F.2d 758 (2nd Cir. 1958),

where ten years' interest was allowed the United States as a subrogated insurer from the date of the loss, and three years' interest was disallowed for a period of delay caused by the government. See also *Silent Friend,* 1943 A.M.C. 94 (E.D. N.Y. 1943) in which a subrogated insurer was allowed six years' pre-judgment interest, with two years' interest denied because of its delay. Simply put, if the assureds suing in their own right should recover interest running from the date of the oil spill, all cross-appellants, including those who are subrogated insurers, are entitled to interest running from that date.

A great many of the cases dealing with the question of the date from which interest runs are collision cases.[1]

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[1]Of course, by no means all pre-judgment interest cases are collision cases. Recent examples of other types of cases where such interest has been allowed are: *American Smelt. & Refin. Co. v. Black Diamond S.S. Corp., supra,* 188 F.Supp. 790 at 792-793, aff'd. 302 F.2d 114 at 116, where the court allowed $676,219.24 in interest from the date of the casualty in an admiralty fire case;

The fact that this is not a collision case does not make such cases inapposite for present purposes. In this case, as in the collision cases, physical damage to vessels was caused by one party's negligence. In this case, as in the collision cases, there is a delay between the time the injury was suffered and the time when payment satisfies the liability therefor. In determining whether the person injured should be compensated for that delay, the relevant factor is not the type of damage suffered, but rather, for example, whether that delay was due to the laxity of the injured party in pressing and prosecuting his claim. The absence of that or similar factors herein has already been discussed.

There are many collision cases standing for the proposition that interest on the damages for the destruction of or injury to a vessel in collision is allowed from the date of collision. Some of the most cited of such cases, which involved injury (and repair thereof), rather than total loss, are:

Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 592-594 (2nd Cir. 1961) cert. den. 368 U.S. 989, 370 U.S. 937 (1962), where the court in an admiralty action under the Death on the High Seas Act allowed such pre-judgment interest, in a well-reasoned opinion by Chief Judge Lombard discussing the whys and wherefores of such interest, noted in 15 Stan.L.Rev. 107 (1962); such interest has also been allowed recently in a breach of charter party case (*Gardner v. Calvert,* 253 F.2d 395 (3rd Cir. 1958)), a bill of lading case *(Lekas & Drivas v. Goulandris, supra),* and for simple negligence causing damage to libelant's vessel *(Reliance Marine Co. v. Schiavone & Sons, Inc.,* 161 F.Supp. 121 (D.Conn. 1957)) and to libelant's dock (*Aguadilla Terminal, Inc. et al. v. American Union Transport, Inc., supra)).*

Galveston Towing Co. v. Cuban S.S. Co.,
195 Fed. 711 (5th Cir. 1912); modified on rehearing in 199 Fed. 904 (5th Cir. 1912);

The El Monte,
252 Fed. 59, 64 (5th Cir. 1918);

Petition of Diamond Coal & Coke Co.,
297 Fed. 242, 246 (W.D. Pa. 1923), aff'd. 297 Fed. 246 (3rd Cir. 1924);

Manauga Nav. Co. v. Aktieselskabet Borgestad,
7 F.2d 990, 993 (5th Cir. 1925).

These cases support cross-appellants' contention that they should receive interest on the damages from the date of the oil spill. Other collision cases distinguish between damages for total destruction of a vessel and damages for injury to the vessel necessitating repairs. (Indeed, such distinction is why collision cases—more than other kinds of maritime cases—treat of the date from which pre-judgment interest shall run.) By such authority, in the case of total destruction, interest runs from the date of the collision, while in the case of injury and repair, interest is allowed from the date of the disbursement of the money spent for repairs. But the rationale for the distinction made in the cases is fully discussed in *The Tanker Hygrade #24 v. The Tug Dynamic,* 233 F. 2d 444 (2nd Cir. 1956), at 447-448:

> "But appellant is correct, we think, in its contention that the interest on the recovery for repairs and cleaning may not, as a matter of law, begin running before the dates of payment. . . . Interest on damages from the date of the collision is frequently allowed where the vessel is lost, rather than merely damaged. [Citations

omitted.] But where the vessel is a total loss, its owner may not recover demurrage, and unless allowed interest from the time of the collision there will be some period during which he will have been deprived of the use of his vessel or her money equivalent without compensation. *The President Madison, supra.* But to grant both demurrage, which theoretically includes the owner's return on his risk capital, and interest on the owner's outlay for repairs before the outlay is made, is to put the owner in a better position than he would have been but for the collision. Hence where the vessel is damaged, rather than lost, *and the owner may therefore recover damages for detention,* interest on repairs generally commences on the date of disbursement. (Citations omitted.)" (Emphasis added.)

Such distinction is not applicable to this case, for no demurrage is involved herein. The owners of the small boats injured by the City's negligence were simply deprived of the use of their boats without compensation therefor. Hence, to have the interest run from a date after the completion of the repairs would not be to make the injured parties whole. Interest from the date of the oil spill to the date of the disbursements for repairs would compensate the boat owners for the deprivation of the use of their boats; thereafter and until entry of final decree, by any line of authority interest should be awarded. As to the subrogated insurers, they stand in the shoes of the boat owners.

To sum up, whether one accepts the line of collision authority allowing interest from the date of the accident

regardless of whether the injury is total or partial, or the line of authority which differentiates between total loss cases and mere injury cases, under the particular facts of this case interest should be allowed to all cross-appellants from the date of the oil spill.

C. The Rate of Interest Should be the Legal Rate of Seven Per Cent.

As with interest *vel non,* the rate of interest is discretionary with the court in admiralty. *The Manhattan,* 10 F.Supp. 45, 49 (E.D. Pa. 1935). As a result, there has been some conflict in the federal courts as to the proper rate of interest. See cases collected in 96 A.L.R. 18, at 38, and 36 A.L.R. 2d 337, at 362-363. The federal courts are not bound in admiralty cases by the state statutory rate of interest, but that rate is usually considered by analogy (as, indeed, it was by the court below), and regarded as a fair measure of the amount to be allowed. Samples of cases in which the legal rate has been awarded in a variety of circumstances are:

The Eagle, 289 Fed. 661, 664 (9th Cir. 1923);

Atlantic Creosoting Co. v. Savannah Ltge., 67 F.Supp. 383 (S.D. Ga. 1946), rev'd. on other grounds 157 F.2d 796 (5th Cir. 1946);

The Guanancita, 69 F.Supp. 928, 931 (S.D. Fla. 1947) (award of interest reduced for delay in bringing case to trial);

The Hannah A. Lennen, supra, 77 F.Supp. at 472, 473-474;

Geotechnical Corp. v. Pure Oil Co., 214 F.2d 476, 477-478 (5th Cir. 1954).

Both *The Guanancita* and *The Hannah A. Lennen* expressly rejected the argument that the court in its discretion should take into account the fact that the "going" interest rate in the state was less than the legal rate. We submit that the legal rate of seven per cent (Cal. Gen. Laws Ann. Act 3757, § 1 (Deering 1954)) is a fair measure of the amount to be allowed as compensation for delay in payment of damages here; that the line of cases so allowing interest represented by those cited above should control; and that the lower court's use of the legal rate for post-decree interest be extended to the pre-decree interest.

D. This Court Should Award Cross-Appellants Seven Per Cent Interest from the Date of the Casualty.

Finally, cross-appellants observe that all the necessary findings of fact on this point have already been made by the district court, and they unequivocally sustain cross-appellants' position herein. Since the district court's failure to award pre-judgment interest in the decree is the only omission and is a legal conclusion, this court may itself remedy the error by ordering such award of interest, and by amending the final decree to so provide. Such practice was expressly followed by this court in *The President Madison, supra,* 91 F.2d at 847-848.

III

Each Cross-Appellant Should Receive a Statutory Docket Fee, and Cross-Appellants Should Receive Their Costs for Copies of Depositions.

A. Each Cross-Appellant Should Receive a Statutory Docket Fee Under 28 U.S.C. § 1923.

Section 1923 of Title 28 of the United States Code provides in part as follows:

> **"§ 1923. Docket fees and costs of briefs**
>
> "(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
> "$20 on trial or final hearing . . . ; . . .
> "$2.50 for each deposition admitted in evidence."

In Case No. 18404, there were 39 libelants. The clerk of the district court took the position [C.T. 247], and it was so ordered by the district judge [C.T. 264-265], that only one docket fee of $20 for trial or final hearing, plus $25 (@ $2.50 for each of ten depositions admitted into evidence), a total of $45, was recoverable by proctors for libelants in such case. Cross-appellants in Case No. 18404 respectfully contend that each of them should recover said docket fee of $45.

Cross-appellants' view is supported by
Title Guaranty & Trust Company of Scranton, Pennsylvania v. Crane Company, 219 U.S. 24 (1910).

In that case multiple claims had been filed in the United States District Court for the Western District of Washington by various laborers and materialmen upon the bond of a contractor for a public work. The main ques-

tion concerned whether or not the subject work was a "public work" such as to enable the various claimants to recover. However, for present purposes, the significant portion of the opinion appeared in the last paragraph, where Mr. Justice Holmes stated for the Supreme Court as follows:

> "The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat. Sec. 824, U.S. Comp. Stat. 1901, P. 632. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit." (219 U.S. at 35.)

(It should be observed that Sec. 824 of U.S. Comp. Stat. 1901, cited by Mr. Justice Holmes, is the lineal ancestor of 28 U.S.C. 1923, as the "Historical Note" in 28 U.S. C.A. clearly shows.)

This is the only case in point which libelants have found which was decided by the United States Supreme Court. While there are various competing analogous lines of authority in the district courts and in the circuit courts, this is therefore the only binding authority.

Indeed, the latest case in point seems to be

Petition of Skibs A/S Jolund,

302 F.2d 114 (2nd Cir. 1962),

where the Second Circuit Court of Appeals reversed the district court and ordered it to tax as costs a docket fee of $2840, being $20 for each of 142 successful cargo claimants represented by the same proctor. There the court alluded to a "rule" to the contrary in this circuit, based upon *Boston Marine Ins. Co. v. Metropolitan Red-*

wood Lumber Co., 197 Fed. 703 (9th Cir. 1912). The *Boston* opinion, however, appears not to have considered the effect of the then-recently decided *Title Guaranty* case. Moreover, adherence to such a supposed "rule" does manifest injustice to cross-appellants in this case in failing to make them whole. Finally, now is as good a time as any for the revision of "antiquated . . . provisions regulating the taxation of costs in admiralty." (302 F.2d at 116.) The vessel owners here may well ask why, under supposedly uniform admiralty law, the City of Los Angeles should escape a cost the City of New York would bear in similar circumstances, simply because of an accident of geography. A reply that a "rule" to the contrary exists in this circuit is slight solace to cross-appellants, and hardly a fitting answer.

Cross-appellants urge, therefore, that the *Title Guaranty* decision of the Supreme Court should control. Its analogy to this case is both clear and close, since here also cross-appellants each have separate and distinct claims and causes of action, and are different parties, even though their claims have been consolidated in a single suit. Both the *Title Guaranty* case and this case therefore present the same situation: one action setting forth several claims. A separate docket fee was there allowed each claimant, and should be allowed each cross-appellant here also.

B. Cross-Appellants Should Recover Their Costs of Copies of Depositions.

Cross-appellants sought to recover as taxable items of cost the $745.12 expense of copies of each of the

twenty depositions used in these cases [C.T. 247]. It was disallowed by the clerk [C.T. 247] and such disallowance was sustained by the district court [C.T. 264-265], on the basis of Local Rule 15 (B)(2)(b) of the district court which provides, in applicable part, "[c]ounsel's copies [of depositions] are not taxable, regardless of which party took the deposition."

It is apparent, however, that this ruling works a severe inequity against cross-appellants in this case. This case was one in which the liability of one or more of the various respondents to cross-appellants was and is relatively clear. The sole question of substance which was tried on this case was who was to pay cross-appellants and in what proportion. The extensive deposition testimony (amounting to some twenty depositions over an extended period of time) which were taken in these cases was directed to that end. Cross-appellants themselves took no depositions. To protect their own interests, cross-appellants were required to attend these depositions, to cross-examine, and to order and obtain copies of the various transcripts of them. The cost of one copy of each of these depositions, although considerable, was far less than the non-recoverable expense of cross-appellants' counsel in preparing for, travelling to and examining at each of such depositions. None of the original depositions were filed until time of trial [C.T. 219, par. 4].

The general authority for cross-appellants' position on this point is found in

Sprague v. Ticonic Nat. Bank,
307 U.S. 161, 167 (1939),

where the Supreme Court reversed a district court decision refusing to consider the allowance of costs beyond the regular taxable costs. In the oft-cited case of

Perlman v. Feldmann,
116 F. Supp. 102, 109-111 (D. Conn. 1953),

the court specifically allowed as taxable costs the expense of one copy of depositions, holding that they "were necessarily obtained for use in the case." In the instant case, the alternatives were to share the original deposition transcript with nine other sets of counsel, or to order and pay for one's own set. Under such circumstances, and on the authority of the *Perlman* case, such cost should be borne by the negligent party whose acts and omissions necessitated obtaining such copies.

The authoritativeness of the *Perlman* decision on this very point was specifically noted by Judge Koelsch recently in

Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 678 (9th Cir. 1963),

where this court allowed the expense of copies of depositions. It should be observed that here the original depositions were not filed, if at all, until time of trial (thus making this case *a fortiori* of *Independent Iron Works*), and here, too, the number and length of the depositions was considerable.

For the foregoing reasons, cross-appellants should recover their cost of copies of depositions.

* * *

(Appellees and cross-appellants note that the City's

point III on its appeal [App. Op. Br. p. 35] is that no docket fee may be taxed for depositions of those witnesses which were used at trial to refresh their recollection or impeach them. Such argument is not only *de minimis,* but is against the clear weight of authority taxing a docket fee for depositions even though the full deposition is not used on trial:

Harris v. Twentieth Century Fox, 139 F.2d 571, 572-573 (2nd Cir. 1943) (docket fee for certain depositions taxed although admittedly the depositions were not needed or used in deciding a summary judgment motion);

Petition of Skibs A/S Jolund, 302 F.2d 114 (2nd Cir. 1962) (Court of Appeals ordered taxation of $2.50 docket fee for each of 24 depositions "read on trial");

Lindeman v. Textron, 136 F.Supp. 157, 158 (S.D. N.Y. 1955) ("excerpts" from depositions admitted on trial);

Perlman v. Feldmann, supra, 116 F.Supp. at 113 ("parts" of certain depositions on written interrogatories received in evidence on trial).)

CONCLUSION

For the reasons above set forth:

(1) as to all appellees, the decrees herein against the City should be affirmed;

(2) as to the cross-appellants:

(a) interest at seven per cent per annum should

be allowed from the time of the casualty to the time of the entry of the final decree;

(b) each cross-appellant should receive a statutory docket fee under 28 U.S.C. § 1923, and cross-appellants should recover their cost of copies of depositions.

Respectfully submitted,

McCutchen, Black, Verleger & Shea
Philip K. Verleger
John Lawrence Leary
Proctors for Appellees and Cross-Appellants Fireman's Fund Insurance Company, et al.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN LAWRENCE LEARY

APPENDIX A

DISTRICT COURT'S FINDINGS OF FACT NOS. (25) AND (26) [C.T. 233-238]

(25) That at the time the oil escaped, said pipeline was defective in the following specific respects, *inter alia,* each of which was a direct and proximate cause of the failure of said pipeline, of the oil spill, and of the damage to the libelants (and the damage, if any, to the City) caused by such spill:

(a) The pipeline and its fittings, and specifically said coupling, could not contain the oil under normal conditions of use.

(b) The Style 38 Dresser coupling, which Gerwick installed in said pipeline in accordance with specific authorization and instructions of the City, was not suitable for use in said pipeline.

(c) The pipeline lacked any properly located expansion joint or joints.

(d) The pipeline lacked blocking, bracing and construction such as to enable it adequately to resist the tendency to separate at the coupling.

(26) That the aforesaid defects in the pipeline, and its failure, the oil spill, and the damage to the libelants (and the damage, if any, to the City) caused by such spill, were proximately caused and contributed to by negligence on the part of the City generally, and in the following specific respects, *inter alia:*

(a) The City, in drawing up its plans and specifications for this construction, failed to calculate the factors which would indicate the correct number and

location of expansion joint(s), although such calculations were both indispensable and good engineering practice.

(b) The said plans were deficient in that the "detail special pipe clamp", set forth on City Plan 1-110-62 (Exhibit "F" on trial) necessarily hampered—not helped—the proper functioning of the expansion joint which was to be placed between its members, by holding the pipeline rigid; moreover, it could not accommodate a suitable expansion joint.

(c) The detail on the City plan referred to in subparagraph (b) above was inadequate in that the specifications therein set forth were irreconcilable, under normal engineering practice, with the installation of a standard expansion joint, and were even confusing to the Chief of the Design Section of the City Harbor Engineering Department, from whence they issued.

(d) The City plans, specifications, piping plans and drawings for this construction were not fit for the purpose intended in that they failed to set forth what type of an expansion joint was to be installed at the point where the line separated, or any detail whatsoever concerning it, except its location.

(e) The City's engineering for this construction was inadequate and not in accordance with reasonable engineering practices or standards, in that the City made no calculations to determine to what forces the pipeline would be subject under conditions of normal use or otherwise, or as to whether it would withstand same safely.

(f) The City's plans, specifications, piping plans and drawings were not fit for the purpose intended in that there was a general lack of engineering detail in said plans, specifications, piping plans and drawings provided by the City for the construction of said pipeline.

(g) After oral inquiry by Gerwick, and with the knowledge of the City a Style 38 Dresser coupling was installed, the expansion capacity of which was severely limited, and was not suitable to said pipeline.

(h) In spite of its knowledge that a Style 38 Dresser coupling was installed in said pipeline, the City never removed or ordered said coupling removed from the line.

(i) The City failed to install or have installed on said pipeline a yoke, anchor lugs or other similar contrivance to prevent the pipe ends slipping out of the coupling.

(j) The hydrostatic tests conducted on said pipeline were observed by said City Inspector Jackson and by Gerwick's supervisory personnel; said pipeline twice failed those tests by parting at the Dresser coupling, as was then known to the City. Those failures were clear warning to the City that said pipeline was inadequate for its normal intended use, particularly at the location of said coupling.

(k) Contrary to reasonable engineering practices or standards, no adequate redesign or reconstruction took place.

(1) The City knew or should have known, from the failures of said pipeline at the coupling during the

hydrostatic tests, that said pipeline was not fit or safe for its normal intended use, in that, among other things, in the City's opinion, the use of temporary blocking rendered the last test unsatisfactory.

(m) The City knew or should have known at the time of the hydrostatic tests that said pipeline was defective, in that the success of the last test was only due to the installation of temporary thrust blocking by Gerwick, and the City then knew or should have known that said pipeline would separate at said coupling under conditions of normal intended use if said temporary thrust blocking were removed without adequate replacement.

(n) The City ordered the removal of the thrust blocking installed by Gerwick, and it was removed not later than the day after the last test, i.e., on or about September 14, 1956, without providing then or thereafter, an adequate replacement for same.

(o) Although the City claimed it considered the writing mentioned in Finding (14), which it received from Gerwick, to be ambiguous, it never made any subsequent inquiry with any of the Gerwick personnel to resolve the claimed ambiguity.

(p) When the City later designed and installed its own bracing in late May 1957 pursuant to Exhibit "R" on trial, said bracing failed to provide adequately against the very type of axial movement which the hydrostatic tests had shown to be present in said pipeline and to be the reason for the test failures, which the City then knew or should have known.

(q) Said City's bracing was accordingly defective.

(r) Contrary to reasonable engineering practices or standards, after the installation of its own bracing, the City totally failed to test said pipeline hydrostatically or in any other way in the condition under which it was to be operated, or otherwise, prior to permitting its use in actual operation.

(s) Contrary to reasonable engineering practices or standards, the City failed to observe said pipeline and particularly said coupling upon its first or subsequent use or uses in actual operation prior to or at the time of the oil spill.

(t) The City accepted said pipeline construction from Gerwick prior to the oil spill, including said Style 38 Dresser coupling, with knowledge of its dangerous and defective condition, as aforesaid.